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No. 115

# In The
# Supreme Court of the United States

## OCTOBER TERM, 1964

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WARREN TRADING POST COMPANY, a corporation,
*Appellant,*

v.

THE ARIZONA STATE TAX COMMISSION and THAD M. MOORE, WARREN PETERSON and W. E. STANFORD as members of The Arizona State Tax Commission,
*Appellees.*

*ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA*

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## APPELLANT'S REPLY BRIEF,

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## APPELLANT'S REPLY BRIEF

## ARGUMENT

In their Brief to this Court, appellees contend for the first time —and apparently as an afterthought—that the legislative history of the Buck Act[1] indicates a Congressional intent to authorize the imposition of state privilege taxes upon sales made by Indian Traders on reservations to reservation Indians. Brief for the Appellees, pp. 16-19. This Reply Brief is directed only to appellees' new argument.

[1] 54 Stat. 1059, October 9, 1940; Recompilation July 30, 1947 (see House Report No. 252, 80th Congress, 1st Session), 61 Stat. 641 (1947), 68 Stat. 1227 (1954), 4 U.S.C. §§ 105-110.

Appellant's answer to this argument is threefold:

1. The Buck Act's definition of "Federal area" (the ambit of the Act) does not include Indian reservations. Being a clear and unambiguous statutory definition, it is controlling and forecloses a consideration of legislative intent.

2. In any event, the legislative history demonstrates that the Buck Act was not intended to change the existing state sales tax picture on the reservations. Instead, the reference to Indians in the Buck Act was included to prevent the misconception that either of two possible changes was intended: (i) that the Act gives tax shelter to sales made by Indian Traders to non-Indians on the reservation (it does not), or (ii) that the Act permits a tax upon sales made to Indians on the reservation (it does not).

3. An early Interior Department interpretation of the Buck Act, acquiesced in by the states over a long period of time, constitutes persuasive evidence that the Act was not intended to permit state taxation of reservation sales to Indians.

Considering first its scope, Sections 105 and 106 of the Buck Act confine its application to Federal areas, and Section 110(e) thereof defines the phrase "Federal area" in pertinent part as follows:

> "The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; . . ."

Are Indian reservations "lands . . . held or acquired by . . . the United States" within the language and purpose of this definition? In some contexts, Indian reservation lands are considered to be held in trust by the United States. However, in other contexts, the

lands are considered as being held or owned by the tribes themselves.[2]

Are they held "for the use of the states or any department, establishment, or agency of the United States . . ."? Here the answer is clearly "no". Reservation lands are held wholly and solely for the use and benefit of the Indians. *Federal Indian Law*, United States Dept. of Interior (1958), p. 590; 1 *Navajo Tribal Code*, pp. xi, xvi and § 746 (5), p. 285; *Healing v. Jones*, 210 F. Supp. 125, 180 (D. C. Ariz. 1962); *In re Forty-Three Cases Cognac Brandy*, 14 Fed. 539 (CC Minn. 1882). Had Congress intended the "Federal area" definition to include Indian reservations, it would have been a simple enough matter to have so written it. As the definition stands, however, Indian reservations are not within the perimeters of its language.

Unambiguous statutes are not properly subject to the process of statutory interpretation. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). And statutory definitions are the controlling guide to ascertaining Congressional intent and prevail over extrinsic aids. *Von Weise v. Commissioner of Internal Revenue*, 69 F.2d 439, 441 (8th Cir.), *cert. denied* 292 U.S. 655 (1934); 2 Sutherland, *Statutory Construction*, §§ 3002 and 4502. Thus, since the language of the Buck Act is unambiguous, and since it includes a clear statutory definition of the term "Federal area" worded so as to exclude Indian reservations, it is inappropriate to consider the Act's legislative history in this regard.

To appellant's knowledge, the only court that has been confronted with the question of whether the phrase "Federal area" includes an Indian reservation has adopted the same view as hereinbefore set forth. In *Your Food Stores, Inc. v. Village of Espan-*

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[2]For a detailed discussion of the situations in which reservation lands are considered to be held or owned by the tribes themselves and of the other situations where these lands are considered to be held in trust for the tribes by the United States, see *Federal Indian Law*. United States Dept. of Interior (1958), pp. 583-745.

*ola,* 68 N.M. 327, 334; 361 P.2d 950, 955-956 (1961), the New Mexico Supreme Court said:

> "By the statutory definition of 'Federal area' it is obvious this statute does not give the states permission to levy a sales tax upon Indian lands. These lands are not lands or premises held or acquired for use of the United States or any department, establishment, or agency of the United States. . . ."

But assume that, despite the unambiguous language of the statutory definition, an inspection of the legislative history is still appropriate. Appellant submits this history strongly supports its position.

The principal operative sections of the Buck Act (§§ 105, 106) authorize the states to impose sales and use taxes in a Federal area "to the same extent and with the same effect as though such area was not a Federal area".

The Legislative Reports show that the main purpose of the Act was to forestall the claim by merchants that sales or delivery of goods within military reservations and national parks were exempt from state sales taxes.[3]

And, as set forth in the "Detailed Explanation of the Bill" contained in the Senate Finance Committee's Report thereof[4], Section 105 of the Act "will not affect any right to claim any exemption . . . on any ground other than that the Federal Government has exclusive jurisdiction over the area where the transaction occurred." Likewise, Section 106 will remove the exemption "where the exemption is based solely on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area."

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[3] (See House Report No. 1267, July 22, 1939, 76th Congress, 1st Session, Vol. 10301; Senate Report No. 1028, July 28, 1939, 76th Congress, 1st Session; Hearing before a Subcommittee on Finance of the United States Senate, Seventy-Sixth Congress, Third Session, April 23, 1940, on H.R. 6687, hereinafter called the "Subcommittee Hearing.")

[4] Senate Report No. 1625, 76th Congress, 3rd Session, May 16, 1940, Vol. 10429, pp. 2, 3 thereof.

Thus, the Buck Act was intended to remove only the barrier to state taxation presented by lack of state jurisdiction over Federal areas, such as military bases and national parks. It was not intended to remove any other barriers, such as the one that exists regarding Indian commerce by virtue of the Commerce Clause of the United States Constitution.

Section 109 of the Act provides:

> "Nothing in Sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed."

How and why did Section 109 come into being? What does it mean and what is it intended to do?

Significantly, H. R. 6687 passed the House of Representatives (on July 26, 1939) without any language equivalent to Section 109 or any other mention of Indians or Indian reservations. It then was duly referred to the Subcommittee of the Senate Committee on Finance. At this point, the Department of the Interior became interested in the bill, and the problems concerning Indians and Indian reservations were first discussed.

It is important to understand that the existing law prior to the passage of the Buck Act permitted taxation of reservation sales to non-Indians, but prohibited taxation of reservation sales to Indians. 57 I.D. 124; *Neah Bay Fish Co. v. Krummel,* 101 P.2d 600 (Wash. 1940). At page 38 of the Subcommittee Hearing, Mr. David Speck, Assistant Solicitor of the Department of the Interior, so summarized it. In one respect, however, the law was not uniformly honored. Some merchants were attempting (improperly) to claim sales tax shelter for on-reservation sales to non-Indians. Subcommittee Hearing, pp. 2, 18-20.

On August 1, 1939, the Acting Secretary of the Interior, Mr. E. K. Burlew, wrote a letter to the Hon. Pat Harrison, Chairman of the Committee on Finance, which is printed in full on pages 38-9 of the Subcommittee Hearing. Despite assurances by the

Office of the Senate Legislative Counsel that the Act was not intended to apply to transactions within Indian reservations, the Acting Secretary in his letter expressed the fear that the Buck Act might be misconstrued by the States to authorize the imposition of taxes upon reservation sales to Indians. He concluded his letter by recommending an amendment to prevent such misconstruction, as follows:

> "Provided, that this Act shall not affect existing law relating to taxation on Indian reservations."

On August 3, 1939, two days after the proposed Burlew amendment, Senator Robert M. La Follette proposed an amendment also designed to maintain the status quo with respect to states' rights to tax on Indian reservations, as follows:

> "Provided that the provisions of this Act shall not be applicable with respect to any transaction occurring in whole or in part within an Indian reservation."[5]

Representatives of California and New Mexico feared the La Follette amendment would be misconstrued so as to destroy the status quo in the opposite direction, i.e. by exempting from taxation reservation sales to non-Indians. Subcommittee Hearing, pp. 2, 18, 19, 20. To prevent this danger, Mr. Dixwell L. Pierce, Executive Secretary of the State Board of Equalization of California, proposed the following pertinent language (Subcommittee Hearing, p. 5):

> "but nothing contained herein shall be construed . . . as affecting any existing law with respect to the taxation of Indians."

Senate Report No. 1625[6], which accompanied the final version of the bill (including the now Section 109) to the Senate, gives no explanation for the failure to follow precisely either the language suggested by Acting Secretary Burlew, that recommended by Senator La Follette, or the proposal of Mr. Dixwell Pierce.

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[5]See Congressional Record for August 3, 1939, page 10907 re discussion of H. R. 6687.

[6]76th Congress, 3rd Session, May 16, 1940, Vol. 10429

But speculation as to the thinking behind the compromise language finally adopted seems in order.

First, the most significant fact is that any Indian amendment was adopted. It appears strongly to indicate the intention to achieve the goal first requested by the Department of the Interior but later sought by all who testified on Indians, i.e. preserve the status quo with respect to state sales taxes on the Indian reservations and forestall the chance of misconstructions to the contrary. Subcommittee Hearing, pp. 2, 18, 19, 20, 38, 39.

Next, the use of the word "Indians" in the final version instead of the phrase "Indian reservations" probably was adopted especially to prevent the misconstruction feared by the California and New Mexico representatives; i.e. that sales to non-Indians on the reservation might be held tax exempt. Subcommittee Hearing, pp. 2, 5, 18, 19, 20, 38.

Finally, the addition of the words "not otherwise taxed" appears to be a catchall phrase, added without reported discussion, and apparently was designed to carry forward the same philosophy as applied to fields of taxation other than sales taxes, i.e. preserve the status quo. *Federal Indian Law*, United States Department of Interior (1958), p. 845.

Therefore, it is submitted that the legislative history of Section 109 of the Buck Act supports the view that the Act was not designed to increase, diminish or otherwise change the rights of the states with respect to sales taxes on Indian reservations, but, instead was designed to preserve those rights in the fashion they existed prior to the Act. In other words, Section 109 was designed to permit the continuation of the taxing of on-reservation sales to non-Indians without removing the exemption existing with respect to the on-reservation sales to Indians.

Three years after the passage of the Buck Act, the Assistant Secretary of the Department of Interior rendered a written opinion which interpreted the meaning of the Act with respect to Indians and Indian reservations (58 I.D. 562, 563 (1943)):

"By the act of October 9, 1940 (54 Stat. 1059, 4 U.S.C. Secs. 12-18), Congress permitted the States to extend their sales taxes to persons residing on or carrying on business, or to transactions occurring, in Federal areas. That act, however, contains no indication of any intent on the part of Congress to interfere with the regulation by the Commissioner of Indian Affairs of trade with the Indians on Indian reservations or to burden the Indians with a tax to which they could not then legally be subjected. On the contrary, Section 5 (4 U.S.C. § 109) of the act declares that the permission given to the States shall not 'be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.' While this declaration is somewhat awkwardly phrased the meaning is plain. Basic Indian immunities under the law in force prior to the enactment were not to be disturbed nor were new immunities to be created. The legality of state taxes on sales to Indians thus is to be determined not by but independently of the provisions of the act of October 9, 1940."

From 1943 to 1958, this interpretation stood uncontradicted and unchallenged by the twenty-five states containing Indian reservations. Such official, contemporaneous and practical interpretation of a statute is persuasive as to its meaning. 2 Sutherland, *Statutory Construction* §§ 5104, 5105, 5106. And when such interpretation is acquiesced in for a long period of time, it is considered of great importance in arriving at a proper construction and may well govern such construction. 2 Sutherland, *Statutory Construction* § 5107. As stated by Justice Frankfurter in *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941):

"Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. . . ."

## CONCLUSION:

For the foregoing reasons, appellant submits that the Buck Act does not expand, diminish or otherwise affect the rights of the states to tax or not tax sales on Indian reservations, and, therefore, the Act is not pertinent to the question before this Court. And for the reasons set forth in Appellant's Opening Brief, it is submitted that Arizona may not license and impose its Transaction Privilege Tax upon an Indian Trader's sales to Indians on an Indian reservation.

Respectfully submitted,

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